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MISCELLANEOUS:

1968 Op. Atty. Gen. Ohio 110 7

In the Supreme Court of the United States

October Term, 1969

No. 654

CLAY E. HUNTER, *Petitioner*

v.

STATE OF OHIO, *ex rel.* ROY E. MILLER, THE STARK COUNTY BOARD OF ELECTIONS, TED W. BROWN, SECRETARY OF STATE, *Respondents*

ON PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT ROY E. MILLER IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of Ohio is unreported.[1] It is printed as Appendix B to the petition for certiorari, page 10a.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on June 18, 1969. On September 17, 1969, Mr. Justice Stewart extended the time to file the petition of certiorari until October 16, 1969. The petition for writ of certiorari was filed on September 25, 1969. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

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1. The citation given by petitioner to 18 Ohio St. 2d 66 (1969) refers to *State ex rel. Stillo v. Gwin*, an unrelated decision.

Questions Presented

May a petition for certiorari be taken from the decision of a state court on an issue not raised or decided below by an individual who is not a party, who made no effort to intervene below until after the judgment of the state supreme court, and who was then denied leave to intervene by the state supreme court?

Did the Ohio Supreme Court deny due process by holding under the Ohio Constitution that the Ohio Constitution may be amended only by those propositions actually placed before the voters on the ballot?

Constitutional Provisions and Statutes Involved

This case involves Article IV and Article XVI, Section 1 of the Ohio Constitution, and Amendment 14, Section 1, United States Constitution. These are reprinted at Appendix A of the petition.

Statement of the Case

On May 7, 1968, the following question was put before the voters of Ohio and answered affirmatively by them:

> "Shall the Constitution of the State of Ohio be amended . . . to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years . . . ?"[2]

An earlier resolution of the state legislature would have made this clause inapplicable until 1970, and even then inapplicable to the first re-election of a sitting judge, but those exceptions were in no way reflected in the proposition submitted to the voters by the Secretary of State under the direction of the legislature.

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2. The full text of the question, which covered other matters not here relevant, is set forth at pages 5-6 of the petition for certiorari.

On January 22, 1969, petitioner (now 74 years of age) filed with the Board of Elections of Stark County, Ohio, nominating petitions for the position of judge of the Municipal Court of Canton, Ohio. Despite the absence of other candidates in the primary, petitioner was not issued a certificate of nomination for the general election to be held in November, 1969.

Respondent Roy E. Miller, a voter and taxpayer, filed an original action in the Supreme Court of Ohio on May 15, 1969, seeking a writ of prohibition to prevent the Stark County Board of Elections from placing petitioner's name on the ballot, and also to prevent the Democratic party from naming a substitute for him. On June 18, 1969 the Supreme Court of Ohio granted the writ of prohibition as to the first issue but declined to reach the second.

Petitioner moved for the first time to intervene in the Ohio Supreme Court after judgment, on the ground that this would permit him to petition for certiorari to this Court. The application to intervene was denied, as was petitioner's application for reconsideration of the denial.

Reasons for Denying Intervention and the Writ of Certiorari

A. There Is No Jurisdiction to Consider Petitioner's Claims: Petitioner Was Neither a Party Below nor Did Anyone Raise There the Issues He Seeks to Present.

1. *The issue was never raised or decided below.*

At pages 7 through 9, petitioner quotes from the brief of the Stark County Board of Elections in an attempt to show that his constitutional issues were raised there, and thus meet this Court's jurisdictional requirements. E.g., *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). This quotation, which is taken out of context, relates to an issue which the court below did not decide, and which is

quite distinct from the issues petitioner seeks to raise here. The most cursory examination of the papers below will establish that fact. It is hard to see how it can have escaped petitioner's attention.

The petition for a writ of prohibition prayed at page 4 for two different kinds of relief: prohibition against submission of Judge Hunter's name on the ballot, and prohibition against substituting the name of another Democrat for his. The first section of the respondent's brief was captioned "The Board of Elections Should Not Be Prohibited From Issuing a Certificate of Nomination to the Honorable Judge Clay E. Hunter." In this section of the brief, respondents below argued only state law. The second section of the brief, assuming that Judge Hunter would not be issued a certificate of nomination or allowed on the ballot, argued that the Democratic party should be permitted to select a substitute candidate for him. This argument was based on an interpretation of Ohio Revised Code §3513.31 which concerns only substitutions, and is entirely irrelevant to the question whether Judge Hunter himself is entitled to be on the ballot. It was in connection with this right of substitution alone that the constitutional issues quoted by petitioner were raised.[3]

3. This issue raised but not decided below would be an entirely improper one for Judge Hunter to raise here. Judge Hunter has no standing to assert the power of the Democratic party to designate a substitute for him, when neither the Democratic party nor any potential substitute has raised such an issue here, nor was it decided below. Indeed, this substitution question is currently the subject of litigation in the Ohio Supreme Court on the facts of this very case; State of Ohio ex rel. Flex v. Gwin Case No. 69-666, filed October 6, 1969. At all events, if an error was made in the course of the May 6 primary, or in refusal to decide the question of the power of the Democratic party to designate a substitute candidate for Judge Hunter, those errors could not be rectified by placing Judge Hunter on the ballot, which is the relief he asks.

The Supreme Court of Ohio did not explicitly decide any constitutional issue, nor did it need to decide implicitly the constitutional issue presented below—an issue quite distinct from that raised here—since the court did not decide the question of substitution in which that constitutional issue was raised. The Ohio Supreme Court merely prohibited placing Judge Hunter's name on the ballot and concluded: "Consideration of the further relief prayed for [the substitution issue] is premature."

2. *Petitioner was properly denied intervention.*

Petitioner's constitutional rights were not adjudicated below for the simple reason that he did not see fit to become a party below. He does not contend that he was unaware of the litigation, but instead asserts that he "relied upon the named respondents to represent his interests." (petn 10).[4] The refusal of the Ohio Supreme Court to permit petitioner's belated entry into the case is based upon an independent and adequate state ground which is not one for this Court's review. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

(a) Petitioner artfully styles his brief as a "petition for leave to intervene." However, there is no case in this Court into which petitioner could intervene; none of the parties has taken the Ohio case, *Ohio ex rel. Miller v. Gwin*, to this Court. Even petitioner designates this case quite differently; *Hunter v. Ohio ex rel. Miller*. The "petition for leave to intervene" must be denied.

(b) Petitioner's brief is really, as he recognizes, essentially a petition for "review of the denial of the application

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4. This Court may wish to take judicial notice of the official correspondence of the Stark County Board of Elections, reproduced at Appendix A, p. 12 infra, which establishes that petitioner was well aware of the pendency of the litigation from the outset.

to intervene," (petn 11) and a petition for certiorari on the merits.

However, there is no basis for taking the first step of overruling the Ohio Supreme Court's decision that petitioner had no right to intervene in the case after judgment. The Ohio Supreme Court granted a motion by a judicial candidate to intervene in a case on all fours with this one except that the motion to intervene was presented before judgment. That case, *State ex rel. Graves v. Brown*, 18 Ohio St. 2d 61 (1969) was cited below as authority for this one and is printed at petition 11a. Had petitioner here moved to intervene before judgment in the Ohio Supreme Court the motion would surely have been granted. At all events, it was no abuse of discretion for the Ohio court to deny intervention after judgment, nor is the exercise of discretion by the Ohio court a proper subject of review here.

On what basis should this Court overrule the decision of the Ohio Supreme Court that by his delay petitioner has lost his right to enter this case? This decision was not based on federal law and constitutes an entirely independent state ground. The adequacy of this independent state ground is no more open to question than the adequacy of any state timeliness requirement, *Edelman v. California*, 344 U.S. 357 (1953). Moreover, unlike most timeliness decisions, the denial of the motion to intervene did not deprive petitioner here of all possibility of relief. If he was not a party to the case below, he was not bound by the judgment in it, and was free to bring an action himself in the Ohio Supreme Court or elsewhere to assert his alleged right to be on the ballot. The judgment in the case below would not be res judicata against him. The fact that petitioner mistook his remedy and attempted an untimely intervention in this case, rather than intervening

earlier, or later bringing an independent action, does not entitle him to relief in this Court.[5]

Petitioner's extensive citation of cases in the federal courts avails him not at all. All of these involve either intervention in the appellate court by a new individual after a party had already brought the case to the appellate

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5. Any responsibility for delay must be laid to petitioner, who had more than a year's notice that this problem would arise should he seek re-election. Petitioner officially declared himself a candidate for re-election on December 30, 1968. The Ohio Supreme Court held on June 19, 1968, in *Euclid v. Heaton*, 15 Ohio St. 2d 65, 238 N.E.2d 790 that the clause of the state legislative resolution which would have prevented the age limit on the judiciary from going into effect until 1970 was ineffective since it was not reflected on the ballot summary placed before the voters. In view of this decision, following *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29 (1916), the clause permitting re-election of a sitting judge was likewise doomed to failure, as the court later held in *Graves*. However, the state attorney general concluded that the clause permitting re-election of sitting judges should instead be applied to 1969 and as well to 1970 in order to prevent any "anomaly" between 1969 and 1970 elections, assuming that the re-election clause was applicable in 1969 despite the absence of any language reflecting the clause on the ballot. Opinion No. 68-110, 1968 Op. Atty. Gen. Ohio 110, printed at petn 13a. The Ohio Supreme Court's rejection of this position in the *Graves* case was almost inevitable in view of its prior decisions in the *Euclid* and *McNamara* cases. In any event the existence of an issue applicable to petitioner's re-election must have become apparent immediately upon the decision of the *Euclid* case, and was underscored by the opinion of the state attorney general. If petitioner wished to avoid a rush to judgment before election, petitioner should have brought a declaratory action to determine his rights long ago, and surely should have acted before the judgment of the Ohio Supreme Court in this case, which was predictably based on the square holding of the *Graves* case.

court, *N.L.R.B. v. Acme Industrial Co.*, 384 U.S. 925 (1966); *Eastern-Central Motor Carriers Assoc. v. United States*, 321 U.S. 194, 198 n. 5 (1944); *McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (C.A. 5 1962) (intervention denied), vacated on other grounds, 384 U.S. 63 (1966); *United States v. Northern Securities Co.*, 128 F. 808 (C.C.S.D. Minn.), aff'd on other grounds, 193 U.S. 197 (1904) (intervention denied); or review by an appellate court of a lower federal court's decision to deny intervention, *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968) (party who had initiated original litigation below vindicating rights under a federal statute in federal court); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) (interpretation of F. R. Civ. P. 24); *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 506 (1941); *Wolpe v. Poretsky*, 144 F.2d 505 (C.A. D.C.) (interpretation of F.R. Civ. P. 24), cert. denied, 323 U.S. 777 (1944). The latter determination is quite different from what the Court is asked to do here. This Court has a supervisory jurisdiction over the procedures and the exercise of discretion of federal courts which it has never exercised over state courts.

The question here is not whether petitioner has an interest in the case, or whether petitioner has standing to assert a claim on the merits in some forum, or whether petitioner could have intervened had this action been brought in the federal courts. Rather, the first question is whether petitioner can raise here a constitutional question no one raised below. The second is whether the Ohio Supreme Court was wrong in refusing to allow petitioner to intervene after judgment. As a matter of Ohio law, to which no federal objection was made, the decision below is correct on both points. Petitioner's attempt, as a new party, to seek certiorari on a new issue is clearly improper.

B. THE SUPREME COURT OF OHIO DID NOT DENY DUE PROCESS BY DECIDING THAT THE OHIO CONSTITUTION IS AMENDED ONLY BY THOSE PROPOSITIONS ACTUALLY PLACED BEFORE THE VOTERS ON THE BALLOT.

The correctness of the Ohio Supreme Court in its interpretation of the Ohio Constitution is obviously not a matter for this Court. Petitioner's argument to the contrary is simply that the people set up a governmental structure which the Ohio Supreme Court misinterpreted, and that this mistake in interpreting the people's will on this fundamental matter denies them due process. To accept this view would be to hold that any state court interpretation of a state constitution is open to review on the merits in this Court.

The ruling of the Ohio Supreme Court is an entirely foreseeable and reasonable interpretation of the state constitution. The Ohio Constitution, Article XVI, Section 1, provides that "If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution." As early as 1916, in *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29, the Ohio Supreme Court held that a clause of a legislative resolution stating the date of effectiveness of a proposed amendment was invalid, since it was not explicitly submitted to the voters, even though the proposed amendment itself was submitted to them. This case, a reasonable interpretation of the constitutional language, was authority for *Euclid v. Heaton*, 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968), which characterized the proposition that any constitutional amendment must be explicitly submitted to the voters as "settled law in this state," and applied it just as in *McNamara* to render invalid the prospectivity clause in the amendment at issue here. In light of *McNamara*, and of *Euclid*, the holding of *Graves*—

that the clause permitting one re-election of a sitting judge was invalid since it was not explicitly submitted to the voters—followed as the night the day.

The Ohio Supreme Court precisely effected the will expressed by the electorate. The people only voted on what was placed before them; petitioner would turn this vote into a blanket endorsement of everything which at one time or another might have been in the minds of the Ohio legislature. It is the petitioner's doctrine which is by far the more dangerous and which would "overrule the voters' desires regarding the manner by which they select their judges." The people are entitled to know upon what they are voting, and the Ohio Supreme Court furthered that right by holding that only those provisions reflected on the ballot become state constitutional law. Otherwise, subtle omissions in the summary might lead the people unwittingly to endorse propositions which could never receive their direct approval.

If the Ohio constitution is to be amended, this should be done by setting out the amendments with succinct precision for the voters' scrutiny, rather than forcing them to rely on often garbled television news or campaign accounts. The Ohio court may permissibly interpret the state constitution to mean that presence of a precise summary on the ballot is better calculated to capture timely voter attention than random publicity, posting of the original somewhere near the polling place, or newspaper notice. Petitioner argues that this means the Ohio Secretary of State has power by his formulation of the summary effectively to propose constitutional amendments himself. First, this assumes an incompetence or bad faith on the part of the Secretary of State which should not be presumed and certainly has not been proved here by any evidence, let alone the "clear evidence" required, *United*

States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). Second, the Ohio legislature can direct the Secretary of State exactly what to put on the ballot, so that he need be left no discretion whatever.

Conclusion

There is no jurisdiction, since the federal constitutional issue was not raised below, and also since petitioner was properly denied intervention below upon an independent and adequate state ground. Moreover, the decision of the Supreme Court of Ohio upon the merits of this matter of state law reinforces the fundamental political right of a free people to vote, by assuring that they are fully aware of that whereon they are voting.

Respectfully submitted,

HENRY A. BERLINER, JR.
1100 Connecticut Avenue
Washington, D.C. 20036

Attorney for Respondent
Roy E. Miller

HARRY SCHMUCK
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Canton, Ohio 44702

Of Counsel
October 15, 1969

May 27, 1969

HON. CLAY E. HUNTER,
Judge of Canton
Municipal Court
City Hall,
Canton, Ohio

In re: Miller vs Stark County Board of Elections – Case No. 69-321 Supreme Court of Ohio

Dear Judge Hunter:

The Stark County Board of Elections, by a motion adopted at a meeting held Monday, May 26, 1969, has instructed me to address the following request to you.

Whereas, the Petition in the case referred to above alleges that you are over 70 years of age, and

Whereas, the Stark County Board of Elections must make a determination as to your age,

Now therefore, The Stark County Board of Elections respectfully requests you to please advise said Board as to your date of birth.

Very truly yours,

JOHN J. WALDECK, *Director*
Stark County Board
of Elections

J J W:mn

MUNICIPAL COURT, CANTON, OHIO

May 29, 1969

Mr. John J. Waldeck, Director
Stark County Board of Elections
Court House Annex
Canton, Ohio 44702

Greetings:

In reply to your inquiry of May 27, 1969, I was born on January 14th, 1895, apparently thirty years too soon.

Yours very truly,

C. E. HUNTER, *Judge*

CEH/mes